

EARL F. HARTLEY

IBLA 80-322

Decided July 30, 1980

Appeal from decision of New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer, NM 38106.

Affirmed.

1. Oil and Gas Leases: Generally – Oil and Gas Leases: Noncompetitive Leases – Oil and Gas Leases: Rentals

An offeror is properly disqualified under 43 CFR 3112.4-1 from receiving a noncompetitive oil and gas lease for an offer drawn with the first priority at a simultaneous drawing when he fails to pay the first year's rental within 15 days of receipt of notice that such payment is due.

APPEARANCES: Earl E. Hartley, Albuquerque, New Mexico, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Earl F. Hartley (appellant) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated December 5, 1979. The decision, in pertinent part, states the following:

Offer to lease for oil and gas filed by Earl E. Hartley for Parcel NM 1102 (July 16, 1979 – Notice of Lands Available for Oil and Gas Filings) was drawn number one at the public drawing held August 7, 1979. This offer, given serial number NM 38106, is hereby rejected for the following reasons:

By notice of Rental Due dated September 18, 1979, we requested \$1,331.00 for rental due on this parcel. On September 24, 1979 we received payment in the amount of

\$1,330.89 which is 11 short. The regulations Title 43 CFR 3112.4-1 require that rental must be received in the proper office of the Bureau of Land Management within fifteen (15) days from the date of receipt of notice that such payment is due. Since payment was not made in full within the time allowed, the offer filed by Earl E. Hartley must be rejected. See C. Panos, 42 IBLA 326 (1979).

On January 2, 1980, appellant filed a notice of appeal and check in the amount of 11 cents with the New Mexico State Office, BLM.

The record shows that appellant submitted, by check dated September 12, 1979, payment (in advance of Notice of Rental Due) in the amount of \$1,330.89 which was received by BLM September 24, 1979. Notice of rental due dated September 18, 1979, was received by appellant on October 2, 1979. The notice, in pertinent part, reads as follows:

#### NOTICE OF RENTAL DUE

In the drawing of simultaneous oil and gas lease offers for the month indicated, you are entitled to an oil and gas lease for:

| Parcel No. | Month         | Acreage | County No. | Rental Due |
|------------|---------------|---------|------------|------------|
| NM 1102    | July 16, 1979 | 1330.89 |            | \$1,331.00 |

In accordance with regulations 43 CFR 3112.4-1, payment of the first year's rental must be received in this office within fifteen (15) days from receipt of this Notice. If the rental is not paid within the time allowed, you will be automatically disqualified to receive the lease.

BLM Form No. 3112-4.

Appellant contends in his statement of reasons that 43 CFR 3103, Fees, Rentals, and Royalty, is the only regulation covering payment of rental on oil and gas leases and that subsection 3103.3-1 affords 30 days from receipt of decision to correct his deficiency citing the dissenting opinion of Administrative Judge Goss in C. Panos, 42 IBLA 326 at 331 (1979), as support.

The majority opinion in C. Panos, supra, answers appellant's contention and is therefore worth repeating in part:

In his statement of reasons appellant refers to 43 CFR 3103.3-1 and 43 CFR 3111.1-1(e) which set forth the

10 percent rule. These regulations provide that an offer to lease with a rental payment deficient by not more than 10 percent is a curable defect and that the additional rental must be paid within 30 days from notice under penalty of cancellation of the lease. Appellant contends that these regulations are applicable to his case because his rental payment was deficient by less than 10 percent and the remainder of the payment was received by BLM within the 30 days allowed.

Appellant claims that these regulations have been applied interchangeably by the Board to simultaneous noncompetitive oil and gas lease offers and cites cases to support his proposition. He notes the addition of 43 CFR 3112.4-1 to the regulations in 1973, but claims it is irrelevant to the application of the 10 percent rule. He admits that 43 CFR 3112.4-1 does modify the first part of 43 CFR 3103.3-1 concerning submission of the first year's rental with the lease offer, but notes that it says nothing about a deficiency in the rental payment. Appellant reasons that if the persons adopting the new regulation had intended to change the applicability of the 10 percent rule, they would have explicitly stated so in the regulation.

[1] 43 CFR 3112.4-1, the regulation governing rental payments for simultaneous oil and gas lease offers, provides as follows:

A lease will be issued to the first drawee qualified to receive a lease upon payment of the first year's rental. Rental must be received in the proper office of the Bureau of Land Management within fifteen (15) days from the date of receipt of notice that such payment is due. The drawee failing to submit the rental payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing.

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Also, appellant's error cannot be waived in the face of intervening rights of the No. 2 and No. 3 drawees. Milton Knoll, supra, at 325. The Board considered the intervening rights of the second and third drawees in a similar situation \* \* \* and stated that:

[a]ppellant's contention based on the arguendo assumption that if the payment did arrive late the authorized officer could nevertheless have accepted it and issued the lease to appellant [sic] is without merit. The regulation, 43 CFR 3112.4-1, plainly states, "The drawee failing to submit payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing" . . . . The disqualification, being automatic, thus affords no latitude for any exercise of discretion. Moreover, this automatic disqualification advances the priority of the next drawee and precludes implementation of 43 CFR 1821.2-2(g), because the rights of a third party have intervened eo instante, timely. Robert D. Nininger, 16 IBLA 200 (1974), aff'd Nininger v. Morton, Civ. Action No. 74-1246 (D.D.C. filed March 25, 1975), wherein the Court stated the following conclusion of law: "\* \* \* The regulations 1810.2(b) and 3112.4-1, Title 43, Code of Federal Regulations, are mandatory and apply to the plaintiff. Said regulations do not permit the consideration of excuses for failure to remit payment." [Emphasis in original.]

As noted above, appellant claims that under the 10 percent rule in 43 CFR 3103.3-1 and 43 CFR 3111.1-1, his check for the deficiency was received on May 23, 1979, only 12 days after BLM had notified him of the deficiency and therefore within the 30-day period allowed by these regulations.

These regulations have not been applicable to simultaneous oil and gas lease offers since the regulations for simultaneous offers were amended in several respects, effective September 17, 1973, by Circular No. 2348, which was published in the Federal Register of August 17, 1973 (38 FR 22230). One of the amendments, section 3112.4-1, eliminated the requirement that the advance rental must be submitted with the simultaneous filing. Duncan Miller, 19 IBLA 133 (1975). The case cited by appellant for the proposition that the 10 percent rule is applicable to simultaneous offers concerned cases in which the offers were filed prior to the effective date of the new regulation. Therefore these cases are not applicable to the case in issue.

We do not construe these regulations to mean that the 10 percent rule is applicable to simultaneous oil and gas lease offers after the 1973 amendment. 43 CFR 3103.3-1 provides that each offer, when first filed, shall be accompanied by full payment of the first year's rental. This regulation governs over-the-counter offers and does not apply to simultaneous offers, because 43 CFR 3112.4-1 specifically states that rental for simultaneous offers must be received within 15 days from the date of receipt of notice that the payment was due.

Neither does 43 CFR 3111.1-1(e) apply to simultaneous offers. 43 CFR Part 3110 deals with noncompetitive leases. 43 CFR Subpart 3111 governs regular offers and 43 CFR 3112 governs simultaneous offers. 43 CFR 3111.1-1(e), the section on curable defects, sets forth the 10 percent rule. Since 43 CFR 3111.1-1(e) is a provision within 43 CFR Subpart 3111, it necessarily applies to regular offers. 43 CFR 3112.4-1, the regulation enumerating the requirements for rental payments for simultaneous offers, has no provision for the 10 percent rule.

The 10 percent rule in 43 CFR 3103.3-1 has a rational basis when applied to over-the-counter offers because the offeror often has no access to plats of survey and thus has no certain method of establishing acreages (and commensurate rentals) with exactitude. Milton Knoll, supra at 323.

Thus 43 CFR 3103.3-1 (1970), relied on by the dissent, provides for present payment of the rental (to accompany offer) whereas 43 CFR 3112.4-1 (1973), specifically covering simultaneous offers, provides for rental to be paid in the future (within 15 days from receipt of notice of rental being due, which of necessity takes place after the drawing of the offer). So, contrary to the dissent, the reasonable conclusion seems to be that an offeror cannot be required to pay rental along with the offer and at a future date after the offer is drawn, and that 43 CFR 3103.3-1 does not apply to simultaneous filings. Also, contrary to the dissent, Susan Dawson, supra, and Milton Knoll, supra, stand for the proposition they are cited for, that failure to comply with 43 CFR 3112.4-1 is grounds for rejection of the offer and this requirement is strictly enforced.

For these reasons we find that appellant's failure to remit the required rental within the time allowed by 43 CFR 3112.4-1 disqualifies him to receive the lease. [Emphasis in original.]

C. Panos, supra at 327-29. See also Donald E. Jordon, 35 IBLA 290 (1978). C. Panos, supra, distinguishes 43 CFR 3103.3-1 from 43 CFR 3112.4-1.

Appellant contends that the acceptance of his first payment and having tendered an additional \$.11 within 30 days of receipt of the BLM decision entitles him to receive the lease. This contention is without merit. The notice of rental due states that payment must be received in accordance with 43 CFR 3112.4-1 which calls for payment within 15 days of receipt of notice of rental due. Payment tendered 92 days after receipt of notice of rental due does not satisfy requirements. See, Edward Goodman, 48 IBLA 152 (1980); Milton Knoll, 38 IBLA 319 (1978); C. Panos, supra. Accord, Gerald Beveridge, 14 IBLA 351, 81 I.D. 80 (1974). Compliance with 43 CFR 3112.4-1 mandates full payment, not partial payment, however minuscule the deficiency. In the case of Milton Knoll, supra, the deficiency was 3 cents.

Appellant makes reference to an additional account 0687 held by BLM from which funds could have been drawn to cover his deficit. It is the responsibility of the prospective lessee, not BLM, to see that payment is made in a timely manner, cf. Duval Corp., 45 IBLA 355 at 361 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing  
Administrative Judge

We concur.

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Anne Poindexter Lewis  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

